Supreme Court of the United States

OCTOBER TERM, 1939.

No. 251.

JAMES STEWART & CO., INC.,

Appellant,

against

CATHERINE SADRAKULA, as Administratrix of the goods, chattels and credits which were of NICHOLAS SADRAKULA, deceased,

Appellee.

Appeal from the Supreme Court of the State of New York.

APPELLANT'S BRIEF.

CLARENCE E. MELLEN,
Counsel for Appellant.

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Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

APPELLANT'S BRIEF.

1.

Official Report of Opinion of Court Below.

The only opinion below, which is officially reported, is that of the Appellate Division, Second Department (R. 131*):

Sadrakula, as Admx. v. *James Stewart & Co., Inc.*, 254 N. Y. App. Div. 892.

The Court of Appeals delivered no opinion (*Sadrakula, as Admx.* v. *James Stewart & Co., Inc.*, 280 N. Y. 651) and the opinion of Lewis, J., in the trial court (R. 122*) is not officially reported.

* Appendix, page 25, *post*.

2.

Grounds Upon Which the Jurisdiction of This Court Is Invoked.

This is a civil action in which appellant had been held liable in damages for the death of appellee's decedent. The accident occurred during the construction of a post office building, which appellant was engaged in erecting, pursuant to a contract with the Treasury Department of the United States (R. 5; Deft's. Ex. A for Iden., R. 121, offered R. 110), on land which had been purchased by the United States for that purpose, with the consent of the State Legislature (R. 17, 18).

Appellant was held liable solely upon the ground that the cause of decedent's death was appellant's failure to comply with the following requirement of a State statute [*McKinney's Consolidated Laws of New York*, "Labor Law," Book 31, Sec. 241, par. 4; Consolidated Laws of New York, Chap. 31, Sec. 241(4); Laws of 1921, Chap. 50, Sec. 241, as amended by Laws of 1922, Chap. 1, and Laws of 1930, Chap. 693]:

> "*Protection of employees on building construction or demolition work.* All contractors and owners, when constructing or demolishing buildings, shall comply with the following requirements:
>
> * * * * * *
>
> 4. If the floor beams are of iron or steel, the entire tier of iron or steel beams on which the structural iron or steel is being erected shall be thoroughly planked over to not less than six feet beyond such beams, except spaces seasonably required for proper construction of the iron or steel work, for raising or lowering of materials or for stairways and elevator shafts designated by the plans and specifications."

The jurisdiction of this Court is invoked under the Act of February 13, 1925, Chapter 229, Section 1* (43 Stat. 936, 937; 28 U. S. C. A., Sec. 344), amending Section 237 of the Judicial Code, and Act of January 31, 1928, Chap. 14; 45 Stat. 54, as amended by Act of April 26, 1928, Chap. 440;

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* Appendix, p. 34, *post*.

45 Stat. 466 (28 N. S. C. A. Secs. 861-A and 861-B), upon the ground that by the decision herein, the highest court of New York sustained the validity of that statute against appellant's contention that, as applied, it is repugnant to Article 1, Section 8, of the Constitution and to the laws of the United States (R. 98, 99, 112, 113, 134-135).

This Court has jurisdiction to determine the constitutional validity of such application of a State statute.

Hamburg-American Steamship Co. v. *Grube*, 196 U. S. 407, 414;
Dickenson v. *Stiles*, 246 U. S. 631, 632;
Dahnke-Walker Co. v. *Bondurant*, 257 U. S. 282, 288, 289;
Ward v. *Krinsky*, 259 U. S. 503, 507, 510;
Home Ins. Co. v. *Dick*, 281 U. S. 397, 406, 407;
Near v. *State of Minnesota*, 283 U. S. 697, 709, 722, 723;
Silas Mason Co. v. *Tax Commission of Washington*, 302 U. S. 187, 188, 189, 190;
Atkinson v. *State Tax Commission*, 303 U. S. 20, 21.

3.

Statement of Case.

This is a civil action, brought by appellee to recover damages for the death of her intestate, resulting from an accident which occurred October 24, 1935, in a post office building which was then under construction in New York City. Appellant, as general contractor, was erecting that building, pursuant to a contract with the Treasury Department of the United States (R. 5, 6, 7, 131), upon a site which the latter had purchased for that purpose in 1931, with the consent of the State Legislature (R. 17, 18).

Decedent's employer contracted to furnish and install certain equipment for mixing and conveying concrete, for appellant's use in the building during its construction (Plff's. Ex. 3, R. 118, offered R. 34).

Decedent was the foreman in charge of the installation thereof, which was started the day before the accident (R. 25, 27). At that time, the structural steel for the section of the building in which it was to be placed, had been completed, but was entirely open, except at the first tier. There, the floor had been completed in all but two adjoining bays. Those bays were about 30 feet by 20 feet in area, divided, lengthwise, into three panels each (R. 37, 38, 43).

The equipment, consisting of a material bin, concrete mixer and bucket-hoist, was to be installed in those bays. As these items were to be integrated, the bin, which had a measuring device and hopper in the bottom, was to be placed in one of the open bays, on the first tier of steel; the bucket-hoist, in the middle panel of the adjoining bay; and the concrete mixer, cribbed up on lumber, on the ground, at a point midway between the bin and the hoist (R. 38, 39, 103, 104, 105, 106, 107).

As the guide-rails for the hoist could be separated by only the width of the bucket (55 inches) it was necessary to place planks, called bucking-pieces, across the panel and attach the rails thereto. The part of the panel in which they should be placed depended upon the precise position in which the bin and concrete mixer were installed; hence, determination thereof was decedent's duty (R. 42).

Prior to the accident, the bin had been placed in position and the guide-rails for the hoist erected to a point above the second tier (R. 30, 75, 76). Those rails could be erected only in "open steel" (R. 39).

Decedent's death resulted from injuries sustained when he fell from the first tier to the ground beneath (R. 18). No one saw him fall, but he had been seen a moment before, standing on the plank marked "M" on Plaintiff's Exhibit 1 (R. 116, offered R. 32), holding a long stick with which he intended to measure one of the guide rails (R. 65, 66, 85, 86).

Appellant was held liable upon the ground that decedent's death resulted from its failure to "thoroughly plank over" the opening through which he fell, as required by the Labor Law of New York, Section 241,* paragraph 4 (R. 122,† 131‡).

Appellant contended that, under Article 1, Section 8 of the Federal Constitution,§ that statute was not validly applicable (R. 98, 99, 112, 113).

4.

Specification of Errors to Be Urged.

The courts below erred:

1. In holding that Labor Law, Section 241(4) applied in the place where the accident occurred (Assignment of Errors 1, 2, 4, 5, R. 142, 143)†;

2. In holding that said statute applied to a Federal instrumentality (Assignment of Errors 3, R. 142)‡;

3. In excluding from evidence Defendant's Exhibit A for Identification (R. 121, offered R. 110, 111), an excerpt from the contract between appellant and the Treasury Department of the United States, in which it was specified that "State or Municipal Building Regulations do not apply to work inside the Government's lot lines" (Assignment of Errors 6, R. 143).

5.

Summary of Argument.

A. As the judgment appealed from is based exclusively upon the violation of a duty created by statute (Sec. 241, par. 4 of the Labor Law of New York), its validity is dependent upon the validity of that statute when so applied.

B. (1) The statute was applied to a building located in territory within the exclusive jurisdiction of the United States; and

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* Appendix, p. 23, *post*.
† Appendix, p. 24, *post*.
‡ Appendix, p. 25, *post*.
§ Appendix, p. 24, *post*.
Appendix, p. 29.

(2) The statute was not effective in that Federal enclave, and its application therein was repugnant to Article 1, Section 8 of the Constitution of the United States.

C. Appellant's contract with the United States was an instrumentality of the Federal Government and, as applied herein, said statute conflicted and interfered with that contract and its performance.

D. The exclusion from evidence of Defendant's Exhibit A for Identification (R. 121, offered R. 110, 111) was reversible error.

6.

Argument.

A.

The judgment herein being based exclusively upon the violation of a duty created by statute* (Section 241, paragraph 4 of the Labor Law of New York), its validity is dependent upon the validity of that statute when so applied.

Under the evidence herein, no *common law* duty rested upon appellant to protect decedent from the dangerous condition which produced his death. No *active* wrong was charged. The dangers of the condition at the place of the accident were open, obvious, known to decedent and inherent in the nature of his work (R. 27, 32, 33, 39, 43, 44, 46). Hence, no duty was imposed upon appellant by the common law to protect him therefrom.

Dorcmus v. *Auerbach*, 176 N. Y. App. Div. 512, 515-516, aff'd, without opinion, 223 N. Y. 719;
McLean v. *Studebaker Bros. Co.*, 221 N. Y. 475, 476, 477, 478;
Dougherty v. *Pratt Institute*, 244 N. Y. 111, 113;
Sieger v. *Crow Constr. Co.*, 235 N. Y. App. Div. 587, 588, 589;
Joyce v. *Concent Ave. Constr. Co.*, 155 N. Y. App. Div. 586, 588, 589, 590;

Swenson v. *Wills, Inc.*, 152 N. Y. App. Div. 711, 712, 716;

Hogan v. *Arbuckle*, 73 N. Y. App. Div. 590, 592, 593;

Callan v. *Pugh*, 54 N. Y. App. Div. 545;

Murphy v. *Altman*, 28 N. Y. App. Div. 472, 474, 475;

American Law Institute, Restatement "Torts," Sec. 340.

The judgment herein is based exclusively upon appellant's failure "to thoroughly plank over the (floor) beams" from which decedent fell (R. 112, 122,* 131†). That duty arises solely from the mandate of the statute in question (Labor Law, Sec. 241[4]‡), and the cause of action asserted herein rests upon that statute.

Racine v. *Morris*, 201 N. Y. 240, 242, 243, 244, 245, 246;

Amberg v. *Kinley*, 214 N. Y. 531, 534, 535;

McNamara v. *Eastman Kodak Co.*, *supra* (220 N. Y. 182, 183);

Lotocka v. *Elevator Supplies Co.*, 246 N. Y. 295, 297, 299;

De Haen v. *Rockwood Sprinkler Co.*, 258 N. Y. 350, 353-355;

Vollstedt v. *Mollar, Inc.*, 238 N. Y. App. Div. 705, 707;

American Law Institute, Restatement "Torts," Sec. 286.

It is clear, therefore, that the decision of the Courts below, upholding the validity of that application of the statute, was essential to sustain the judgment.

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* Appendix, p. 24.
† Appendix, p. 25.
‡ Appendix, p. 23.

B.

1.

The statute (Labor Law, Sec. 241) was applied to a building located in territory within the exclusive jurisdiction of the United States.

It was stipulated that the building in which the accident occurred was located upon land purchased by the United States in 1931, with the consent of the State Legislature, as the site for a post office (R. 17, 18), which was being erected by appellant, pursuant to a contract with the Federal Government, dated November 9, 1934 (R. 5, 110). The accident occurred therein a year later (R. 5, 18).

In the courts below appellee did not question that the United States had exclusive jurisdiction thereof, nor did those Courts deny it. On the contrary, the Appellate Division, which delivered the only opinion in which that subject was mentioned, characterized it as a "Federal reservation" (R. 131; 254 N. Y. App. Div. 892*).

However, in her motion to dismiss or affirm in this Court, appellee argued that Federal jurisdiction was not acquired until certified copies of the documents of title were filed with the Secretary of State of New York, by an agent of the United States, on December 26, 1935, about two months after the accident.

That argument was based upon Section 211 of the General Municipal Law† (Consolidated Laws of New York, Chap. 24, Sec. 211; Laws of 1909, Chap. 29, Sec. 211) and Section 52 of the State Law‡ (Consolidated Laws of New York, Chap. 57, Sec. 52; Laws of 1909, Chap. 59, Sec. 52).

As that question involves the extent of the jurisdiction of the United States, it is a Federal question within the jurisdiction of this Court.

Silas Mason Co. v. *Tax Commission of Washington*, 302 U. S. 186, 197, and cases cited.

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* Appendix, p. 25.
† Appendix, pp. 25, 26.
‡ Appendix, pp. 26, 27, 28.

Prior to 1896, all consents to the purchase of land by the United States were granted by special statutes. The first *general* statute, L. 1896, Chap. 391, from which Sections 50 to 57, inclusive, of the State Law were derived (McKinney's Consolidated Law, "State Law," Book 56, Sec. 50, and footnote), granted consent to the purchas of "any tract, piece or parcel of land * * * *situate upon or adjacent to the navigable waters*" * of the State, for a number of purposes, including post offices, and provided for recording the documents of title with the appropriate officer of the county in which the land was situated. The limitation to "lands situated upon or adjacent to the navigable waters" of the State was not removed until 1910 (L. 1910, Chap. 109, Sec. 1).

In the interim, therefore, consent to the purchase of land *not* upon or adjacent to such waters was obtainable only by special act of the Legislature. To meet that situation with respect to *inland* sites for *public buildings*, as to which such "consent" was required before any public money could be expended thereon (Resolution of Congress, September 11, 1841 [5 Stat. at L. 468]; 40 U. S. C. A., Sec. 255†), consent was granted, in 1899, to the acquisition "in any city," of land, "not exceeding two acres" in area, as sites for buildings to accommodate "post offices and other governmental offices" (L. 1899, Chap. 242) and, in 1907, such consent was extended to such sites in villages, as well as in cities (L. 1907, Chap. 375, Sec. 1).

As a result, since 1910, there have been two "consent" statutes; one to the "purchase" of *any* land "within the boundaries" of the State, for *many* purposes, including post offices (State Law, Sec. 50); and the other, to the acquisition "by condemnation, purchase or gift" of *not over two acres*, in cities or villages, as sites for buildings to accommodate "post offices and other governmental offices" (General Municipal Law, Sec. 210).

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* Italics supplied.

† Appendix, p. 28.

We believe it reasonable to assume that, in enacting those statutes, the Legislature contemplated that there was land *then owned* by the United States, the *jurisdiction* of which remained in the State, because of lack of "consent" or "cession" (*James* v. *Dravo Contracting Co.*, 302 U. S. 134, 141, 142; and cases cited therein). By Section 211 (General Municipal Law) and Section 52 (State Law), a general method was therefore provided by which, in such cases, jurisdiction would be *ceded* upon the recordation of the documents of title thereto, with the Secretary of State.

Evidently, therefore, the consent to *future* purchases contemplated by Clause 17 was intended to be given by both statutes. Because of its limited scope, that granted by Section 210 (General Municipal Law) is fully included within that granted by Section 50 (State Law). As there is no evidence that the land herein involved is not *over* two acres in area, the General Municipal Law does not apply. Hence, the State Law, which contains no such limitation (Sec. 50), is alone applicable.

By Section 52 thereof, the Governor is *authorized* to execute formal *cessions* of jurisdiction, "if he deems it proper," upon the filing, by an agent of the United States, of certified copies of the documents of title of any tracts of land which "*have been** acquired" for any of the purposes specified in Section 50.

To construe those provisions as a reservation of the consent given in Section 50, pending compliance therewith, necessitates the conclusion that the legislative intent was to *delegate* to the executive *discretionary* authority to *nullify* the consent given by Section 50. In effect, therefore, to delegate to the executive the authority to grant or refuse the consent which Clause 17 specifies must be given by the "Legislature." Apart from the doubtful validity of such delegation of legislative authority (Constitution of New York, Art. 3, Sec. 1; *Darweger* v. *Staats*, 267 N. Y. 290, 305, *et seq.*), we believe that, properly interpreted, the statute discloses no such legislative intent.

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* Italics supplied.

That, under Clause 17, the State may grant its consent with qualifications reserving *jurisdiction*, not inconsistent with the Government's use of the land, is *now* settled.

James v. *Dravo Cont'g Co.*, *supra* (302 U. S.), 147, 148.

That it may *refuse* its consent is, of course, clear. However, here consent is *given* (Sec. 50). The effect of the statute (Sec. 52), as appellee would construe it, is to fix the method by which the United States must *accept* it.

When that statute was enacted, although the question had not been decided, the opinion had been uniformly expressed, both by the courts and the Attorney General of the United States, that formal *cession* of jurisdiction was unnecessary when *consent* was obtained, pursuant to Clause 17, Section 8, Article 1 of the Federal Constitution, because, in such cases, the Constitution itself, *proprio vigore*, transferred jurisdiction.

Ft. Leavenworth R. Co. v. *Lowe*, 114 U. S. 525, 537, 538, 539;
Benson v. *United States*, 146 U. S. 325, 330, 331;
United States v. *Unzeuta*, 281 U. S. 138, 142;
Surplus Trading Co. v. *Cook*, 281 U. S. 647, 652;
James v. *Dravo Contracting Co.*, *supra* (302 U. S. 142);
Silas Mason Co. v. *Tax Comm. of Washington*, 302 U. S. 186, 197;
Farley v. *Scherno*, 208 N. Y. 269, 271;
People v. *Hillman*, 246 N. Y. 467, 479;
9 *Opin. Attorneys General*, 129, 130.

Then as now, Congress *required* that such consent be obtained *before* the expenditure of any public money upon land acquired for "public buildings" (Resolution of Congress, Sept. 11, 1841 [5 Stat. at L. 468]; 40 U. S. C. A., Sec. 255*; 9 *Opin. Attorneys General*, 129, 130), and acceptance thereof

* Appendix, p. 28, *post*.

is to be presumed in the absence of evidence to the contrary (*Silas Mason Co.* v. *Tax Commission*, 302 U. S. 207; *Atkinson* v. *Tax Commission*, 303 U. S. 23).

Although the *power* of the State, after granting consent, to impose restrictions upon the *manner* in which the Federal Government must *accept* it, is open to serious doubt, we deem it unnecessary to press that question.

We submit that, properly construed, Section 52 applies only to land acquired by the United States, either *prior* to the enactment of that statute and *without* consent, or, to that acquired thereafter, but in a *manner*, or for a purpose as to which consent was not given by Section 50.

So construed, the entire statute is consistent and effectuates the obvious purpose of providing a general and uniform method by which the United States *would* acquire jurisdiction in all cases contemplated by Clause 17 and *might* acquire it in such *other* cases as the executive departments of both governments should deem desirable.

Cf. Collins v. *Yosemite Park & Curry Co.*, 304 U. S. 518, 528.

The building to which the statute in question (Labor Law) was held applicable, was, therefore, within the exculsive jurisdiction of the United States by virtue of Section 8, Clause 17 of Article 1 of the Federal Constitution.

2.

The statute (Labor Law, Sec. 241) was not effective in that Federal enclave and its application therein is repugnant to Article 1, Section 8 of the Constitution of the United States.

When the United States acquired jurisdiction of the enclave, the Labor Law was in effect *throughout* the State. It was held by the courts below that, as it had not been displaced by Congress, it therefore remained effective in this Federal enclave (R. 131).

It is unquestionably the rule that upon such transfer of jurisdiction, certain State laws, termed municipal, govern

ing the personal and property rights of the inhabitants, in their relations with one another, remain effective, unless they conflict with the poltical character, institutions or Constitution of the United States. That rule, borrowed from international law, results from the necessity of avoiding the impossible alternative, that, until action by Congress, there would be *no* law therein for the protection of such rights.

American Ins. Co. v. *Canter*, 1 Pet. (26 U. S.) 511, 541;
Chicago, R. I. & Pac. R. R. Co. v. *McGlinn*, 114 U. S. 542, 546, 547;
Western Union Tel. Co. v. *Chiles*, 214 U. S. 274, 277, 278;
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Arlington Hotel Co. v. *Fant*, 278 U. S. 439;
Halleck, International Law, Chap. 34, Sec. 14;
38 *Columbia Law Review*, p. 133.

That rule, as stated in *Halleck's International Law* (Vol. 2, Chap. 34, Sec. 14, p. 516), which was cited by Mr. Justice Field in the leading case on this subject, *Chicago, R. I. & Pac. R. R. Co.* v. *McGlinn*, *supra* (114 U. S. 546), is:

> "'The laws of a conquered country,' said Lord Mansfield, 'continue in force until they are altered by the conqueror; * * *.' This refers to the municipal laws of the conquered country, but not to its political laws, or to the relations of the inhabitants with the government. On the transfer of territory, it has never been held that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved, and new relations are created between them and the government which has acquired the territory; * * * The law, which may be denominated *political*, is necessarily changed, although that which regulates the intercourse and general conduct of individuals remains in force until altered by the newly created power of the State. This is a well-settled rule of the law of nations. Its provisions are clear and simple, and easily understood; but it is not so easy to dis-

tinguish between what are *political* and what are *municipal* laws, and to determine *when* and *how far* the Constitution and laws of the conqueror change or replace those of the conquered."

Implicit in such rule is the assumption that laws which thus "continue in force" have been *adopted* by the new government *as its own*. Such assumption is necessitated by the fact that, after termination of the legislative power of the government by which they were promulgated, sanction for their continued potency must be found in the *existing* legislative power.

Ex parte Siebold, 100 U. S. 371, 388;
Vilas v. *City of Manila*, 220 U. S. 345;
Silas Mason Co. v. *Tax Commission*, 302 U. S. 186, 197;
Oklahoma City v. *Sanders* (C. C. A.), 94 F. (2d) 323;
Steele v. *Halligan*, 229 Fed. 1011, 1018;
Farley v. *Scherno*, 208 N. Y. 269.

As such "adoption" necessarily involves the exercise of legislative power, it should be only *presumed* as to laws which are clearly within the purpose of the rule and which, when *applied*, will not interfere with the activities of the government.

The Labor Law (Consolidated Laws of New York, Chap. 31) is a comprehensive code of regulations designed to promote the health, welfare and personal safety of those engaged in many different occupations. Article 10 thereof, consisting of three sections, of which Section 241 is one, relates to the construction of buildings. In New York City, its *enforcement* is entrusted to the superintendent of buildings, a municipal official, who is also charged with the enforcement of the city Building Code (Labor Law, Sec. 242; *Baldwin's New York Code of Ordinances*, Chap. 5, Art. 1, Secs. 4, 9, 10), a municipal ordinance which, having been confirmed by the State Legislature (L. 1901, Chap. 466, Sec. 467), has the force of a statute (*Racine* v. *Morris*, 201 N. Y.

240, 244). That official is empowered to enter upon all premises in which such work is being conducted, require compliance with the requirements of both the Labor Law and the Building Code, and, if he deems it necessary, *stop all work*, pending compliance with their requirements (Labor Law, Sec. 242; *Baldwin's New York Code of Ordinances*, Chap. 5, Secs. 10 and 190; *People ex rel. Levering* v. *Leo*, 112 N. Y. Misc. R. 325).

Those provisions for its executive administration and enforcement clearly distinguish this statute from those which have been classified as "municipal."

> Cf. *Chicago, R. I. & Pac. R. R. Co.* v. *McGlinn*, *supra* (114 U. S. 542);
> *Arlington Hotel Co.* v. *Fant*, 278 U. S. 439;
> *Crook* v. *Old Point Comfort*, 54 F. (2d) 669;
> *McCarthy* v. *Packard Co.*, 105 N. Y. App. Div. 436; aff'd on opinion below, 182 N. Y. 555.

Exercise of such *executive* authority in Federal territory would clearly infringe upon Federal sovereignty.

> *Arizona* v. *California*, 283 U. S. 423, 451, 452;
> *Educational Films Corp.* v. *Ward*, 282 U. S. 379, 388, 389;
> *Oklahoma City* v. *Sanders* (C.C.A.), 94 F. (2d) 323, 326 *et seq.*;
> *United States* v. *San Francisco Bridge Co.*, 88 Fed. 891, 894, 895.

May it then be reasonably inferred that the Federal Government intended that this statute should be only *partially* effective in its territory?

In an analogous situation, this Court, through Mr. Justice Roberts, said (*Murray* v. *Joe Gerrick & Co.*, 291 U. S. 315, 319):

> "If it were held that beneficiaries may sue, pursuant to the compensation law, we should have the *incongruous situation* that this law is *in part* effective and in part ineffective within the area under the jurisdiction of the federal government." (Italics supplied.)

In that case, the statute under consideration was the Washington Workmen's Compensation Act and the question was its applicability in Federal territory under the Act of Congress of February 1, 1928 (45 Stat. 54; 16 U. S. C. A., Sec. 457, quoted below). As in this case, the answer was dependent upon the legislative intent. It is clear, therefore, that the incongruity of such *partial* applicability of the statute was recognized as a cogent reason for declining to *attribute* such intention to Congress.

Even though its *executive* provisions be deemed eliminated, the mandates thereof, as applied herein, are not "municipal", but "political".

The enclave herein was a mere building site. The *only* building therein to which the statute *could* apply, was to be constructed pursuant to a contract with the United States. *Complete* control of its construction was vested in the Secretary of the Treasury by Congress (40 U. S. C. A., Secs. 285, 341, 342*). The mandate of the statute would, however, if applicable, *supersede* any orders or directions given in the exercise of that authority.

It was said, in effect, by the Court below† that an intention to adopt the mandates of the statute is confirmed by the Act of Congress of February 1, 1928 (45 Stat. 54; 16 U. S. C. A., Sec. 457), which provides:

> "*Action for death or personal injury within national park or other place under jurisdiction of United States; application of state law.* In the case of the death of any person by the neglect or wrongful act of another within a national park or other place subject to the exclusive jurisdiction of the United States, within the exterior boundaries of any state, such *right of action* shall exist as though the place were under the jurisdiction of the state within whose exterior boundaries such place may be; and in any action brought to recover on account of injuries sustained

* Appendix, p. 30.
† Appendix, p. 25.

in any such place the rights of the parties shall be governed by the laws of the State within the exterior boundaries of which it may be."

That statute has been before this Court for construction in only one case, *Murray* v. *Joe Gerrick & Co., supra* (291 U. S. 315). It was then held that the remedies granted by the Washington Workmen's Act were not rights of action, within the meaning thereof.

In that case, the Washington statute, after abolishing the common law remedies previously enjoyed by servants, for injuries received through the negligence of their masters and substituting a system of compensation, regardless of negligence, created a new right, enforceable by action, against an employer who failed to comply therewith. Obviously, the *right* for which the remedy by civil action was granted, was *created* by the statute.

So here, the *right*, if any, was *created* by the statute, the *remedy* being granted by Section 130 of the Decedent Estate Law (Consolidated Laws of New York, Chap. 13, Sec. 130), the effectiveness of which, under the above-quoted Act, is not questioned.

Whether considered under that Act of Congress, or under the rule of general law, the ultimate question is one of *intention*.

As has been shown, the statute involved herein is such that it *could not* be effective in its *entirety*, in Federal territory, and its *mandates*, when applied in territory devoted entirely to Federal projects, are such that their *adoption* therein should not be presumed. In fact, such presumption would seem contrary to the actual intent of Congress, as evidenced by its failure to enact several bills introduced therein, which had for their object the adoption of State safety laws to all Federal projects. The most recent of which we are aware, introduced in the 75th Congress (Feb-

ruary 24, 1937), by Senator Sheppard (S. 1744; Congressional Record, Vol. 81, No. 42, p. 2139), read:

> "Be it enacted," etc., "That all agencies of the Federal Government undertaking construction of public buildings and other public works under Federal law shall observe, and shall require all employees and contractors to observe the various State safety laws, as well as safety laws and regulations of the Federal Government."

We submit, therefore, that the State statute in question (Labor Law, Sec. 241) was not in force in this Federal enclave and its *application* therein is repugnant to Article 1, Section 8 of the Federal Constitution.

C.

Appellant's contract with the United States was an instrumentality of the Federal Government and, as applied herein, the statute (Labor Law, Sec. 241) conflicted and interfered with that contract and its performance.

The accident happened in a post office building which was being erected pursuant to a contract with the Treasury Department of the United States (R. 5, 18, 110).

The Treasury Department is authorized by Congress to design such buildings, prepare the plans and specifications therefor, enter into contracts for their construction and supervise their erection.

40 U. S. C. A., Secs. 285, 341, 342.*

The exercise of that authority is, therefore, the performance of a governmental function.

Constitution of the United States, Art. 1, Sec. 8, Clauses 7 and 18;
Graves v. *New York*, 304 U. S. 466, 477.

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* Appendix, p. 30.

The *contract* of the Secretary of the Treasury with appellant in this case was, therefore, an instrumentality of the Federal Government.

James v. *Dravo Contracting Co.*, *supra* (302 U. S. 149, 150, 155);
Pittman v. *Home Owners' Loan Corp.*, ... U. S. ...., 84 L. Ed. (Adv. No. 1) 16, 18;
Federal Land Bank v. *Crosland*, 261 U. S. 374, 378, 379.

As applied herein, the statute (Labor Law, Sec. 241) operated directly upon that contract.

The contract stipulated: "State or Municipal Building Regulations did not apply to work inside the Government's lot lines" (Deft.'s. Ex. A for Iden.* R. 121, fol. 363, offered, R. 110, 111).

Although the purpose of Labor Law, Section 241, is the promotion of safety in building operations, the method adopted to accomplish that purpose is by regulating the time when, and the manner in which, floors shall be installed in the construction of buildings. Clearly, therefore, that statute is a "building regulation" within the meaning of that term, as used in the contract.

It seems clear that the inclusion of that specification in the contract by the responsible government officers (40 U. S. C. A., Secs. 341, 342) was the result of their determination that *compliance* with such regulations would hinder and impede performance of the work.

Clearly, therefore, the statute in question was applied directly contrary to that *determination* of the administrative officers charged by Congress with the conduct of this governmental activity, and to impose a burden upon, and interfere with, an instrumentality of the Federal Government.

Doubtless it will be urged here, as it was in the courts below, that the imposition of liability upon *appellant* did not interfere with its *work* under the contract. We believe that argument to be unsound. It begs the question. As

* Appendix, p. 29, *post*.

has been shown, appellant's liability is the *result* of its alleged violation of that statute. Had it *complied* therewith, there would have been no liability. However, compliance would have conflicted with its contract with the Government.

It can hardly be supposed that the Government *intended* to subject its contractor to potential civil liability for failure to comply with a regulation which, by its contract, it specifically stated should not apply to its work.

We submit, therefore, that even if it be determined that the building in question was within the territorial jurisdiction of the State, the statute in question, as applied herein, conflicts and interferes with an instrumentality of the United States and is, therefore, repugnant to the Constitution of the United States.

McCulloch v. *Maryland*, 4 Wheat. 316, 436;
Osborn v. *Bank of United States*, 9 Wheat. 738, 867;
Western Union Tel. Co. v. *Texas*, 105 U. S. 460, 465;
Arizona v. *California*, 283 U. S. 423, 451.

D.

The exclusion from evidence of Defendant's Exhibit A for Identification (R. 121, offered, R. 110, 111) was reversible error.

As stated above, that exhibit,* an excerpt from appellant's contract with the United States, contained the following stipulation:

> "State or Municipal Building Regulations do not apply to work inside the Government's lot lines."

Its exclusion "as not binding" (R. 110, fol. 330) was apparently upon the theory that a contract may not relieve a party thereto from the performance of a duty owed by him to a stranger thereto.

That rule, as usually applied, is not questioned. Here, the situation is different. As has been shown,† the contract

* Page 29, *post*.
† Page 19, *ante*.

was an *instrumentality* of the Federal Government and was also evidence of executive *determination* that compliance with the statute (Labor Law, Sec. 241) would burden, hinder and interfere with the performance thereof.

As the execution of this Federal project was entrusted to those officials by Congress* (40 U. S. C. A., Secs. 285, 341, 342), their authority in that connection would seem clear.

> *Maryland Casualty Co.* v. *United States*, 261 U. S. 342, 349.

In *Anderson* v. *Chicago & N. W. R. R. Co.* (162 Neb. 578, 168 N. W. 196), the Supreme Court of Nebraska held that an order of the War Department directing defendant not to fence its right of way in the Fort Robinson Military Reservation, *barred* an action under a state statute imposing such duty. In that case the statute was identical to the one involved in the *McGlinn* case, *supra* (114 U. S. 542), and had been in effect *before* jurisdiction was *ceded* to the United States.

It was there said (at p. 584):

> "The war department has decided that the fencing of the right of way would impair the effectiveness of the territory for the purpose for which the cession was made. * * * It is not for the state or its citizens to interfere with the purpose for which control of the territory was ceded, and, when the defendant was forbidden to erect the fences by that department of the United States government lawfully in control of the reservation, *no other citizen can complain of a non-performance* or hold defendant guilty of a violation of law." (Italics supplied.)

It is submitted, therefore, that the exclusion of that evidence was reversible error.

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* Appendix, page 30, *post*.

In conclusion, we respectfully urge that for all of the reasons set forth above, the judgment appealed from should be reversed.

CLARENCE E. MELLEN,
Counsel for Appellant.

APPENDIX.

Labor Law (Consolidated Laws of New York, Chap. 31, Sec. 241).

"SEC. 241. PROTECTION OF EMPLOYEES ON BUILDING CONSTRUCTION OR DEMOLITION WORK. All contractors and owners, when constructing or demolishing buildings, shall comply with the following requirements:

1. If the floors are to be arched between the beams thereof, or if the floors or filling in between the floors are of fireproof material, the flooring or filling in shall be completed as the building progresses.

2. If the floors are not to be filled in between the beams with brick or other fireproof material, the underflooring shall be laid on each story as the building progresses.

3. If double floors are not to be used, the floor two stories immediately below the story where the work is being performed shall be kept planked over.

4. If the floor beams are of iron or steel, the entire tier of iron or steel beams on which the structural iron or steel work is being erected shall be thoroughly planked over to not less than six feet beyond such beams, except spaces seasonably required for proper construction of the iron or steel work, for raising or lowering of material or for stairways and elevator shafts designated by the plans and specifications.

5. If elevators, elevating machines or hod-hoisting apparatus are used in the course of construction, for the purpose of lifting materials, the shafts or openings in each floor shall be inclosed or fenced in on all sides by a barrier of suitable height, except on two sides which may be used for taking off and putting on materials, and those sides shall be guarded by an adjustable barrier not less than three nor more than four feet from the floor and not less than two feet from the edges of such shafts or openings. * * *"

The Constitution of the United States (Art. 1, Sec. 8, Clauses 1, 7, 17 and 18).

"The Congress shall have Power * * * To establish Post Offices and Post Roads; * * * To exercise exclusive Legislation * * * over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful buildings; and

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Decision of Supreme Court, Trial Term (Hon. Harry E. Lewis, Justice), Dated November 30, 1937 (R. 122; Not Officially Reported).

"Sadrakula, as admx., &c. v. James Stewart & Co., Inc., and ano. (corrected)—Action by the plaintiff against the general contractor, James Stewart & Co., Inc., for damages resulting from the death of her husband, an employee of a subcontractor. The proximate cause of the accident which occasioned decedent's death was the failure of the defendant to thoroughly plank over the beams as required by Section 241, subdivision 4 of the Labor Law. The defense of assumption of risk is not maintainable where, as here, the relationship of master and servant did not exist. There was likewise a failure to establish that plaintiff's decedent was guilty of any contributory negligence. I direct judgment in favor of the plaintiff for the sum of $23,125.

LEWIS,
J. S. C."

Decision of Appellate Division, Second Department (R. 131; *Sadrakula* v. *James Stewart Co., Inc.*, 254 N. Y. App. Div. 892).

"Action for damages for the death of plaintiff's decedent as a consequence of a violation by the defendant of Section 241, subdivision 4, Labor Law, in the course of the erection of a Federal post office building.

Judgment for plaintiff unanimously affirmed, with costs. (a) The evidence adequately established that the proximate cause of the decedent's death was defendant's failure to plank over the steel beams in the western area of the 'bay' as required by Section 241, subdivision 4, Labor Law. (b) The labor law provision was in effect at the place of the accident because that statute was enacted prior to the acquisition of the property by the Federal Government. The common law and statutes in effect before the act of cession remain in force until displaced by Congress (Kaufman v. Hopper, 220 N. Y. 184, 187, 115 N. E. 470, and cases cited therein). There has been no action by Congress displacing the Labor Law in respect of this Federal reservation. Such Federal action as has taken place is confirmatory of plaintiff's right to invoke the applicable State statutes (45 Stat. 54, tit. 16, U. S. Code, sec. 457)."

Article 11 of General Municipal Law (Consolidated Laws of New York, Chap. 24, Secs. 210, 211, 212; L. 1909, Chap. 29, Secs. 210, 211, 212).

"*Sec. 210. United States may acquire land in cities.* The United States is hereby authorized to acquire by condemnation, purchase or gift in conformity with the laws of this state, one or more pieces of land not exceeding two acres in extent, in any city or village of this state, for the purpose of erecting and maintaining thereon a public building for the accommodation of post-offices and other governmental offices in any such city or village."

"*Sec. 211. Certified copy of transfer to be filed.* Whenever the United States, by any agent authorized under the hand and seal of any head of an executive department of the government of the United States, shall cause to be filed and recorded in the office of the secretary of this state, certified copies of the record or transfer to the United States of any such pieces of land which had been acquired by the United States for the purposes specified in section two hundred and ten of this article, together with maps and descriptions of such lands by metes and bounds, exclusive jurisdiction, except as provided in section two hundred and twelve, is thereupon ceded to the United States over the lands so described, during the time that the United States shall be or remain the owner thereof."

"*Sec. 212. Jurisdiction of state not affected.* The jurisdiction ceded to the United States as prescribed by this article shall not prevent the execution on the land acquired for the purposes specified in section two hundred and ten of any process civil or criminal, issued under the authority of the state, except as such process might affect the property of the United States thereon."

Article 4 of the State Law (Consolidated Laws of New York, Chap. 57, Secs. 50 to 57, Inclusive; L. 1909, Sec. 50, as Amended by L. 1922, Chap. 14, and Secs. 51 to 57, Inclusive).

"*Sec. 50. Consent of state to purchase of land and record of conveyances.* The consent of the state of New York is hereby given to the purchase by the government of the United States, and under the authority of the same, of any tract, piece or parcel of land from any individual or individuals, bodies politic or corporate within the boundaries of this state, for the purpose of parade or manœuver grounds, aviation fields, navy yards and naval stations, or for the purpose of erecting thereon lighthouses, beacons, light-house

keepers' dwellings, hospitals, sanatoriums, works for improving navigation, post-offices, custom houses, fortifications, or buildings and structures for the storage, manufacture or production of supplies, ordnance, apparatus or equipment of any kind whatsoever for the use of the army or navy, and any other needful buildings and structures, and all deeds, conveyances or other payers relating to the title thereof shall be recorded in the office of the register, if any, or if not in the office of the county clerk, of the county where the said lands are situated."

"*Sec. 51. Proceedings for acquiring title.*" (Detailed methods by which United States may acquire title when unable to agree with owners, or where owners are unknown, etc. Not pertinent herein.)

"*Sec. 52. Governor may execute deed or release.* Whenever the United States, by any agent authorized under the hand and seal of any head of an executive department of the government of the United States, shall cause to be filed and recorded in the office of the secretary of state of New York, certified copies of the record or transfer to the United States of any tracts or parcels of land within this state, which have been acquired by the United States for any of the purposes aforesaid, together with maps or plats and descriptions of such lands by metes and bounds, and a certificate of the attorney-general of the United States that the United States is in possession of said lands and premises for either of the works or purposes aforesaid, under a clear and complete title, the governor of this State is authorized, if he deems it proper, to execute in duplicate, in the name of the state and under its great seal, a deed or release of the state ceding to the United States the jurisdiction of said tracts or parcels of land as hereinafter provided."

"*Sec. 53. Concurrent jurisdiction as to service of process.* The said jurisdiction so ceded shall be upon the express condition that the state of New York shall retain a concurrent jurisdiction with the United States on and over the property and premises so conveyed, so far as that all civil and crim-

inal process, which may issue under the laws or authority of the state of New York, may be executed thereon in the same way and manner as if such jurisdiction had not been ceded, except so far as such process may affect the real or personal property of the United States."

"*Sec. 55. Delivery and filing of deeds and releases.* One of the deeds or releases so executed in duplicate shall be delivered to the duly authorized agent of the United States, and the other deed or release shall be filed and recorded in the office of the secretary of state of New York: and said deed or release shall become valid and effectual only upon such filing and recording in said office."

"*Sec. 56. Statement to be published in session laws.* The secretary of state shall cause to be printed in the session laws of the year succeeding the filing in his office of said deed, a statement of the date of the application of the United States for said deed and a copy of the description of the lands so conveyed or ceded, together with the date of the recording of said deed in the office of the said secretary of state."

"*Sec. 57. Article not to apply to Orange county.* This article shall not apply to the county of Orange."

United States Code, Title 40, Sec. 255 (R. S. [2nd Ed., 1878], Sec. 355).

"**Title to land to be purchased by United States.** No public money shall be expended upon any site or land purchased by the United States for the purposes of erecting thereon any customhouse, or other public building, of any kind whatever, until the written opinion of the Attorney General shall be had in favor of the validity of the title, nor until the consent of the legislature of the State in which the land or site may be, to such purchase, has been given. * * *"

(Omitted part not pertinent.)

Defendant's Exhibit A for Identification (R. 124; Excluded, R. 111; Assignment of Errors, Item 6).

Contract between James Stewart & Co., Inc., and the United States of America, Treasury Department, Procurement Division, dated November 9, 1934, referred to in paragraph "Second" of the Amended Complaint, in which said James Stewart & Co., Inc., is described as "the contractor," contained the following provisions, among others:

"21. PROTECTION OF PUBLIC AND PROPERTY.—The contractor shall protect all materials and work, whether incorporated in the building or not, against injury from any cause, and shall provide and maintain all necessary guards, lights, etc., for the protection of the public, and he shall comply with all Municipal ordinances which apply to the use of sidewalks and streets or alleys for building operations, but such ordinances do not apply inside of the lot lines. He shall be held responsible for any damage or injury to persons or property which may occur as a result of his fault or negligence in the prosecution of the work."

"2. PERMITS.—The contractor shall without additional expense to the Government obtain all required licenses, permits, etc. This applies to work outside the lot lines, the use of streets and sidewalks, the protection of public and traffic, connections to utility service lines, etc. State or Municipal Building Regulations do not apply to work inside the Government's lot lines."

40 U. S. C. A. Sections 285, 341, 342.

"§ 285. Buildings under control of Secretary of Treasury. All courthouses, customhouses, post offices, appraiser's stores, barge offices, and other public buildings outside of the District of Columbia and outside of military reservations which have been purchased or erected, or are in course of construction, or which may be erected or purchased out of any appropriation under the control of the Treasury Department, together with the site or sites thereof, are expressly declared to be under the exclusive jurisdiction and control and in the custody of the Secretary of the Treasury, who shall have full power to take possession of and assign and reassign rooms therein to such Federal officials, clerks, and employees as in his judgment and discretion should be furnished with offices or rooms therein. (July 1, 1898, c. 546, § 1, 30 Stat. 614; May 29, 1920, c. 214, § 1, 41 Stat. 654.)

"§ 341. Secretary of Treasury authorized to acquire sites for and construct public buildings. To enable the Secretary of the Treasury to provide suitable accommodations in the District of Columbia for the executive departments, and independent establishments of the Government not under any executive department, and for courthouses, postoffices, immigration stations, customhouses, marine hospitals, quarantine stations, and other public buildings of the classes under the control of the Treasury Department in the States, Territories, and possessions of the United States, he is hereby authorized and directed to acquire, by purchase, condemnation, or otherwise, such sites and additions to sites as he may deem necessary, and to cause to be constructed thereon, and upon lands belonging to the Government conveniently located and available for the purpose (but exclusive of military or naval reservations), adequate and suitable buildings for any of the foregoing purposes, giving preference, where he considers conditions justify such action, to cases where sites for public buildings have prior to May 25, 1926, been acquired or authorized to be acquired, and to enlarge, remodel, and extend existing public buildings under

the control of the Treasury Department, and to purchase buildings, if found to be adequate, adaptable, and suitable for the purposes of this chapter, together with the sites thereof, and to remodel, enlarge, or extend such buildings and provide proper approaches and other necessary improvements to the sites thereof. When a building is about to be constructed on a site acquired prior to May 25, 1926, and such site is found by the Secretary of the Treasury to be unsuitable for its intended purpose, he is hereby further authorized and empowered to acquire a new site in lieu thereof by purchase, condemnation, exchange, or otherwise, and except in case of exchange to dispose of the present site by public sale and to execute the necessary quitclaim deed of conveyance: *Provided, however*, That the Secretary of the Treasury is also authorized to acquire a site for a building for the Supreme Court of the United States: *Provided further*, That aside from land that may be acquired for a site for a building for the Supreme Court of the United States, and for enlarging the site of the Government Printing Office, or erecting a storage warehouse or warehouses, the sum of $50,000,000, hereinafter authorized for projects in the District of Columbia, shall be used exclusively for the purpose of acquiring by purchase, condemnation, or otherwise, south of Pennsylvania Avenue and west of Maryland Avenue, projected in a straight line to Twining Lake, such sites or additions to sites as the Secretary of the Treasury may deem necessary to provide such suitable office accommodations in the District of Columbia as are hereinbefore mentioned, of constructing adequate and suitable buildings for the furnishing of such office accommodations on said sites or additions to sites, or on sites already owned by the Government south of Pennsylvania Avenue and west of Maryland Avenue, as above mentioned, and of providing suitable approaches to said buildings, and beautifying and embellishing their surroundings as nearly in harmony with the plan of Peter Charles L'Enfant as may be practicable. Said buildings shall be so constructed as to combine high standards of architectural beauty and practical utility: *Provided*, That in carrying into effect

the provisions of this chapter, in so far as relates to buildings to be used in whole or in part for post-office purposes, the Secretary of the Treasury, under regulations to be prescribed by him, shall act jointly with the Postmaster General in the selection of towns or cities in which buildings are to be constructed and the selection of sites therein: *Provided further*, That all sketches, plans, and estimates for buildings shall be approved by the Secretary of the Treasury and the heads of the executive departments which are to be located in such building.

"The Secretary of the Treasury is authorized to carry on the construction work herein authorized by contract, or otherwise, as he deems most advantageous to the United States.

"In all cases where the construction of buildings in the District of Columbia, under the provisions of this chapter, requires the utilization, in the opinion of the Secretary of the Treasury, of contiguous squares as sites thereof, authority is hereby given for closing and vacating such portions of streets as lie between such squares and such alleys as intersect such squares, and the portions of such streets and alleys so closed and vacated shall thereupon become parts of such sites. (May 25, 1926, c. 380, § 1, 44 Stat. 630.)

"§ 342. Duties of Office of Supervising Architect; employment of assistance; compensation; expenses. (a) The work of preparing designs and other drawings, estimates, specifications, and awarding of contracts, as well as the supervision of the work authorized under the provisions of this chapter, shall be performed by the Office of the Supervising Architect, Treasury Department, under the direction of the Secretary of the Treasury, except as otherwise provided in this chapter.

"(b) When deemed by him advantageous the Secretary of the Treasury is authorized, in special cases, (1) to procure by contract the floor plans and designs of buildings developed sufficiently to serve as guides for the preparation of working drawings and specifications, or to employ advisory assist-

ance involving design or engineering features, and (2) to employ, to the extent deemed necessary by him in connection with the construction of buildings for the Departments of Commerce and Labor, the architects who were successful in competition heretofore held for a building for the then Department of Commerce and Labor, and to pay reasonable compensation for such services.

"(c) The Secretary of the Treasury is authorized to employ such additional technical, scientific, and clerical assistance in or under the Office of the Supervising Architect, both in the District of Columbia and in the field, as he deems necessary, and to fix such rates of compensation therefor as he deems proper, not, however, in excess of the maximum rates paid for the same or similar service in other departments, such employment to be made in accordance with the civil service laws, rules, and regulations, and to submit to Congress through customary channels, estimates for appropriations for compensation for such personal services, and for travel, subsistence, and other expenses involved in making any investigation or survey of building conditions or in the examination of sites which he may find to be necessary. (May 25, 1926, c. 380, § 2, 44 Stat. 631.)"

Act of February 13, 1925, Chapter 229, Section 1; 43 Stat. 936, 937 (U. S. Code, Title 28, Section 344), Amending Judicial Code, Section 237.

"(a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, * * * where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, * * *, of laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ." (Part omitted not pertinent.)

Act of January 31, 1928, Chapter 14; 45 Stat. 54, as Amended by Act of April 26, 1928, Chapter 440; 45 Stat. 466 (28 U. S. C. A. Sections 861-A and 861-B).

"That the writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal.

"Section 2. The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas, and mandate, shall be applicable to the appeal which the preceding section substitutes for a writ of error."